Supreme Court, U.S.
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No. 98-821

In The

Supreme Court of the United States

October Term, 1998

BOARD OF REGENTS OF THE STATE OF TENNESSEE, ET AL.,

Petitioners,

v.

DALVAN M. COGER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the 1974 Amendments to the Age Discrimination in Employment Act of 1967 contains a clear abrogation of the States' Eleventh Amendment immunity from suit by individuals.

2. Whether the 1974 Amendments to the Age Discrimination in Employment Act of 1967, authorizing suit for monetary relief against the States, was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 154 F.3d 296 (6th Cir. 1998). The opinion of the district court (Pet. App. 26-41) is unreported.

JURISDICTION

The court of appeals entered its judgment on August 17, 1998. The petition for a writ of certiorari was filed on November 16, 1998. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. This action was filed in 1989 by seventeen (17) senior faculty members of Memphis State University (now the University of Memphis) who were employed by the University in ten (10) different departments. The lawsuit asserted claims against the State and State officials for violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* The district court, sitting without a jury, heard Plaintiffs' proof during the course of twenty-one (21) days of trial. At the conclusion of Plaintiffs' proof, Defendants filed motions, pursuant to Rule 52(c) for judgment on partial findings. On May 24, 1996, the district court entered an Order denying Defendants' motions as to most of Plaintiffs' claims. In its Order, the District Court found, among other things, that Plaintiffs had "produced sufficient evidence to permit a finding that age discrimination was defendants' standard

operating procedure." (Docket Entry #235 at 52). The district court further found that Plaintiffs' statistical proof was "sufficiently compelling [to demonstrate] age-based disparity of treatment" and "a background from which a pattern or practice of discrimination could easily emerge." (Docket Entry #235 at 52). Additionally, the district court found that there was "direct evidence of discriminatory animus at the highest levels of the university administration focused on older faculty members throughout the university . . . far beyond insignificant, isolated or sporadic acts". (Docket Entry #235 at 52-53).

Subsequent to entry of that Order, and before the trial resumed to hear Defendants' evidence, this Court decided the case of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Defendants then moved to dismiss on the basis of Eleventh Amendment immunity and, on January 2, 1997, without resuming trial to hear Defendants' proof, the district court entered an Order dismissing the ADEA action in its entirety on the basis that the State of Tennessee enjoyed Eleventh Amendment immunity against ADEA actions.

2. Plaintiff's filed a timely appeal of the district court's decision and the United States intervened on appeal pursuant to 28 U.S.C. § 2403(a). The Court of Appeals for the Sixth Circuit subsequently reversed the decision of the district court. *See Coger v. Board of Regents*, 154 F.3d 296 (6th Cir. 1998). The court of appeals held "that Congress made its intent to abrogate the states' immunity against ADEA suits imminently clear". *Coger*, 154 F.3d at 302. The court reasoned that the intent of Congress to abrogate States' immunity is found by the expansion of the definition of "employer" to encompass

"a state or political subdivision of the state and any agency or instrumentality of the state". *Id.* at 301. Congress amended this definition knowing that express provisions of the ADEA provide that an employer who violates the statute is liable for legal and equitable relief. *Id.*

The court of appeals also held that "Congress did not exceed the scope of its Section 5 authority" in extending the ADEA to the states. *Id.* at 305. In concluding that Congress had validly exercised its Section 5 powers, the court noted Congress's extensive factual findings detailing substantial instances of arbitrary discrimination because of age. *Id.* at 304. The court noted that "evidence before Congress established that qualified workers were being fired, not hired, and paid less because of their age," and as well that "employers used age as an arbitrary proxy for ability". *Id.* Noting the "wide latitude" afforded Congress, the Sixth Circuit determined that the scope of the ADEA was not so broad as to be disproportionate. *Id.* at 307 (citing *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

ARGUMENT

The Sixth Circuit correctly decided that the 1974 Amendments to the ADEA clearly express Congress's intent to abrogate Eleventh Amendment immunity. Further, the court of appeals correctly held that in abrogating States' Eleventh Amendment immunity Congress acted pursuant to a valid exercise of Section 5 authority to

enforce the Equal Protection Clause of the Fourteenth Amendment.

The decision of the Sixth Circuit is consistent with five (5) circuits that have addressed the same issue. *See Cooper v. New York State Office of Mental Health,* 162 F.3d 770 (2d Cir. 1998); *Migneault v. Peck,* 158 F.3d 1131 (10th Cir. 1998); *Keeton v. University of Nevada Sys.,* 150 F.3d 1055 (9th Cir. 1998); *Scott v. University of Mississippi,* 148 F.3d 493 (5th Cir. 1998); and *Goshtasby v. Board of Trustees,* 141 F.3d 761 (7th Cir. 1998). However, Plaintiffs-Respondents recognize that two (2) circuits have reached a different conclusion. *See Humenansky v. Regents of Univ. of Minn.,* 152 F.3d 822 (1998) and *Kimel v. State of Florida Bd. of Regents,* 139 F.3d 1426 (11th Cir. 1998). Additionally, Plaintiffs-Respondents recognize that certiorari has been granted by the Court in *Kimel v. State of Florida Board of Regents,* 139 F.3d 1426 (11th Cir. 1998), *cert. granted,* 67 U.S.L.W. 3348, 67 U.S.L.W. 3380, 67 U.S.L.W. 3464, 67 U.S.L.W. 3468 (U.S. Jan. 25, 1999) (No. 98-791). Plaintiffs-Respondents respectfully submit that the Petition for Writ of Certiorari of the State of Tennessee should be held pending disposition of *Kimel v. State of Florida Bd. of Regents, supra,* or in the alternative, this Petition should be denied since the Sixth Circuit correctly decided these issues.

Respectfully submitted,

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Date: March 18, 1999